

EXHIBIT 1

Swenson, Jon

From: Swenson, Jon
Sent: Sunday, December 16, 2018 3:54 PM
To: 'Herrington, Beth'; 'Fieweger, James P (35849)'
Cc: Guy, Hop; 'Gollwitzer, Arthur III (73161)'; 'Bertin, Robert C.'
Subject: RE: Call
Attachments: Motion to Extend Deadline to Produce ESI_Active_39165112_5.DOCX

All,

Please find attached Defendants' proposed motion to modify the MIDP disclosures. Please let us know prior to or on the meet and confer tomorrow if Plaintiff opposes the motion.

Thanks,

Jon

From: Swenson, Jon
Sent: Friday, December 14, 2018 7:07 PM
To: Herrington, Beth; Fieweger, James P (35849)
Cc: Guy, Hop; Gollwitzer, Arthur III (73161); Bertin, Robert C.
Subject: RE: Call

Beth,

Let's plan for a call at 10:30 am central on Monday. We can use the following dial-in:

1-888-822-7517;
Passcode: 2548367

Attached are our initial revisions to the protective order you proposed. I've included a clean copy and redline.

Also, we will be sending you a draft motion to modify the scope and timing of the production of materials under the MIDP prior to the call. If you have any comments on these or proposals regarding the issues you raise below, please provide them in writing prior to the call.

Thanks,

Jon

From: Herrington, Beth <beth.herrington@morganlewis.com>
Sent: Friday, December 14, 2018 1:53 PM
To: Fieweger, James P (35849) <jpfieweger@michaelbest.com>
Cc: Guy, Hop <hop.guy@BakerBotts.com>; Swenson, Jon <jon.swenson@bakerbotts.com>; Gollwitzer, Arthur III (73161) <agollwitzer@michaelbest.com>; Bertin, Robert C. <robert.bertin@morganlewis.com>
Subject: RE: Call

I had proposed 10:30 am on Monday as an option. Does that time not work? I'm traveling to a dep in the afternoon.

Thanks—
Beth

Beth Herrington
Morgan, Lewis & Bockius LLP
77 West Wacker Drive | Chicago, IL 60601
Direct: +1.312.324.1445 | Main: +1.312.324.1000 | Cell: +1.312.543.8291 | Fax: +1.312.324.1001
beth.herrington@morganlewis.com | www.morganlewis.com
Assistant: Rhoda Morris | +1.312.324.1157 | rhoda.morris@morganlewis.com

From: Fieweger, James P (35849) <jpfieweger@michaelbest.com>
Date: Friday, Dec 14, 2018, 2:08 PM
To: Herrington, Beth <beth.herrington@morganlewis.com>
Cc: hop.guy@BakerBotts.com <hop.guy@BakerBotts.com>, jon.swenson@bakerbotts.com <jon.swenson@bakerbotts.com>, Gollwitzer, Arthur III (73161) <agollwitzer@michaelbest.com>, Bertin, Robert C. <robert.bertin@morganlewis.com>
Subject: RE: Call

[EXTERNAL EMAIL]

Beth

Any reason we can't do the call Monday? I can't imagine it will take more than 10-15 minutes.

James P. Fieweger

Partner

T 312.596.5849 | michaelbest.com



From: Herrington, Beth <beth.herrington@morganlewis.com>
Sent: Friday, December 14, 2018 7:25 AM
To: Fieweger, James P (35849) <jpfieweger@michaelbest.com>
Cc: hop.guy@BakerBotts.com; jon.swenson@bakerbotts.com; Gollwitzer, Arthur III (73161) <agollwitzer@michaelbest.com>; Bertin, Robert C. <robert.bertin@morganlewis.com>
Subject: RE: Call

Hi Jim – Could we instead talk at either 10:30 a.m. CT on Monday or 1 p.m. CT on Tuesday?

In addition to the topics you raised, we'd also like to discuss:

- (i) The sufficiency of defendants' disclosures
- (ii) The protective order
- (iii) ESI

Please let me know if either time works.

Thanks—
Beth

Beth Herrington

Morgan, Lewis & Bockius LLP

77 West Wacker Drive | Chicago, IL 60601

Direct: +1.312.324.1445 | Main: +1.312.324.1000 | Cell: +1.312.543.8291 | Fax: +1.312.324.1001
beth.herrington@morganlewis.com | www.morganlewis.com
Assistant: Rhoda Morris | +1.312.324.1157 | rhoda.morris@morganlewis.com

From: Fieweger, James P (35849) <jpfieweger@michaelbest.com>
Sent: Wednesday, December 12, 2018 1:34 PM
To: Herrington, Beth <beth.herrington@morganlewis.com>
Cc: hop.guy@BakerBotts.com; jon.swenson@bakerbotts.com; Gollwitzer, Arthur III (73161) <agollwitzer@michaelbest.com>
Subject: Call

[EXTERNAL EMAIL]

Beth
Let me know if there is a time Friday after 11:00 CST that we can talk to address (1) the sufficiency of Ubiquiti's initial disclosures and (2) applying the amended MIDPP order to our case.

James P. Fieweger

Partner

E jpfieweger@michaelbest.com

T 312.596.5849 | M 312.259.4913 | F 312.222.0818



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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UBIQUITI NETWORKS, INC.,

Plaintiff,

v.

CAMBIUM NETWORKS, INC.;
CAMBIUM NETWORKS, LTD.;
BLIP NETWORKS, LLC;
WINNCOM TECHNOLOGIES, INC.;
SAKID AHMED; and DMITRY
MOISEEV,

Defendants.

Civil Action No.: 1:18-cv-05369

JURY TRIAL DEMANDED

**DEFENDANTS' [UN]OPPOSED MOTION TO EXTEND THE DEADLINE TO
PRODUCE ESI PURSUANT TO THE MIDP STANDING ORDER**

I. INTRODUCTION

Defendants Cambium Networks, Inc. (“Cambium”), Cambium Networks, Ltd. (collectively, “Cambium Defendants”), Blip Networks, LLC, Winncom Technologies, Inc., Sakid Ahmed, and Dmitry Moiseev (all six defendants collectively, “Defendants”) respectfully request that the Court grant an extension to the deadline for production of Electronically Stored Information (“ESI”) set by the Mandatory Initial Discovery Pilot Project Standing Order (“MIDP Standing Order”). Defendants’ Motion to Dismiss Under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) (“Motion to Dismiss”) as to all 14 claims for relief asserted against Cambium and the single claim for relief against the other Defendants is currently pending. Motion to Dismiss (D.I. 37), October 19, 2018. At the December 11, 2018 status conference (the “Status Conference”), in response to Defendants’ Motion to Dismiss, Plaintiff Ubiquiti Networks, Inc. (“Plaintiff”) argued that as to the central Claims 4 and 6 pertaining to copyright infringement and breach of contract by Cambium, the case is limited to two main “buckets,” or factual scenarios. The first bucket relates to the claim that Cambium violated the public performance right in Plaintiff’s User Interface, and the second bucket pertains to certain unspecified code containing the configuration and calibration information and the AirMAX protocol (“Plaintiff’s Admissions”). The RICO Claim 15 is the only claim asserted against the remaining Defendants (Defendants Cambium Networks, Ltd., Winncom, Blip, Ahmed, and Moiseev), and resolution of that claim in Defendants’ favor would remove them from this case, leaving only Cambium.

Given this posture, it would be unduly burdensome for the 5 non-Cambium Defendants to undertake the burden of producing ESI related to 14 claims not asserted against them, while the Motion to Dismiss is pending. It would also be unduly burdensome for Cambium to have to undertake the burden of producing ESI for the 14 claims outside of the two “buckets” of

allegations that Plaintiff admitted were the only things at issue in this case. Finally, the newly revised Amended Standing Order Regarding Mandatory Initial Discovery Pilot Project, December 1, 2018 (“Amended MIDP Standing Order”) automatically postpones the production of ESI until after an order on any Rule 12(b) motions in recognition of this undue burden. Defendants’ request that the present case be brought within the provisions of the Amended MIDP Standing Order.

Under the pre-existing MIDP Standing Order procedures, Defendants and Plaintiff served their Mandatory Initial Discovery Pilot Project (“MIDP”) responses on December 5, 2018, as ordered by the Court. Notification of Docket Entry (D.I. 36), October 18, 2018. Under the MIDP Standing Order’s requirement that all parties produce the identified ESI within forty days after serving their initial responses, the current ESI production deadline is January 14, 2019.

For the reasons below, and as invited by the Court, Defendants respectfully request that the ESI production deadline set by the MIDP Standing Order be continued until 40 days after any amended pleading filed after the entry of an order resolving the pending Motion to Dismiss or 40 days after an order denying Defendants’ Motion to Dismiss.

This is Defendants’ first request for an extension of a discovery deadline. [Plaintiff opposes this motion.]

II. ARGUMENT

A. The MIDP disclosure requirements should be significantly narrowed based on Plaintiff’s Admissions.

Plaintiff’s Complaint asserts 14 causes of action against Cambium, the vast majority of which are based on Cambium’s alleged copyright infringement of unidentified portions of Plaintiff’s code. As the Court noted at the Status Conference, the current claims are concealed within a “scavenger hunt” of overbroad factual allegations. *See* December 11, 2018 Status

Conference Tr. (Exhibit 1) at 28:9. Despite containing 398 paragraphs of factual allegations over 74 pages, the Complaint relies on conclusory allegations and did not adequately put Defendants on notice as to what the actual claims of copyright infringement and breach are.

At the Status Conference, Plaintiff admitted that its copyright allegations are limited to Cambium's alleged display of its user interface (*see id.* at 17:16-20) and copying of unidentified configuration and calibration *information* and the AirMAX protocol (*see id.* at 17:23-18:7, 36:25-37:2). The Complaint does not reflect this limited scope of Plaintiff's Admissions, as the Court noted.¹ *See, e.g., id.* at 23:23-25, 24:17-18, 27:22. Nor did Plaintiff's Opposition briefing. *See Ubiquiti Networks, Inc.'s Memorandum in Opposition to Defendants' Motion to Dismiss* (D.I. 39).

There is an immense difference in the breadth of ESI production required pursuant to the MIDP Standing Order between the currently operative Complaint and a complaint properly narrowed to reflect Plaintiff's Admissions. As pointed out at the Status Conference, the definition of "Ubiquiti Firmware," which forms the basis for all of Plaintiff's claims, includes any object code provided with any Ubiquiti device. *See id.* at 33:15-21. Taken as a whole, the Complaint on its face purports to require Cambium to produce multiple versions of millions of lines of code and documents related to all aspects of its Elevate firmware. But what Plaintiff now admits is truly at issue requires only the production of a published "Quick Start Guide" and YouTube video created by Cambium Defendants and limited (but still-not-specified) portions of the Elevate firmware dealing with configuration and calibration information and the AirMax protocol. It's the difference between producing several images of the interface itself along with a small amount of code or information, versus producing multiple version of all of the code

¹ The Court even noted a potential Rule 10 issue with Plaintiff's Complaint. Status Conference Tr. at 28:9-11 ("But at the same time, it can't be a scavenger hunt to kind of figure out what your claim is. That causes a Rule 10 problem.").

required to run the device. *See* Status Conference Tr. at 26:22-27:9. The latter now appears to be entirely unnecessary, particularly as a targeted preliminary disclosure.

Although Plaintiff is not required to set forth complete disclosure of its legal theories, it does have to factually state in a discernible way what it is that Cambium did to allegedly violate its copyrights. *Id.* at 29:24-30:3. Given Plaintiff's Admissions as to the true scope of the present lawsuit, any production required by automatic application of the old MIDP Standing Order procedures on Plaintiff's original Complaint creates an enormous hardship upon Defendants. Simple application of the new, Amended MIDP Standing Order procedures would entirely remove this hardship.

Defendants' Motion to Dismiss is still pending before the Court, and Defendants cannot ascertain the full scope of Plaintiff's allegations until the Court issues its ruling (even if it only limits the case to Plaintiff's Admissions and does not dismiss any of the other unsupported allegations against Defendants). Due to the uncertainty surrounding Plaintiff's allegations and Defendants' pending Motion to Dismiss, Defendants request that the ESI production deadline be continued until a reasonable time after the Court issues its order. After the ruling, the ultimate scope of Plaintiff's allegations and which claims for relief survive should be clear, and Defendants will be able to amend their MIDP responses and produce the required ESI without incurring as much unnecessary cost.

B. Continuing the ESI production deadline furthers the MIDP goals.

The MIDP production should be limited to the allegations and claims in this case that will ultimately survive dismissal, or as limited by Plaintiff's Admissions. The Court recently amended the MIDP Standing Order, which in its amended version allows parties to serve their initial disclosures after a motion to dismiss is decided (*compare* MIDP Standing Order at § A.3. ("Parties must file answers, counterclaims, crossclaims, and replies within the time set forth in

Rule 12(a)(1)-(3) even if they have filed or intend to file a motion to dismiss or other preliminary motion”) *with* Amended MIDP Standing Order at § A.3. (“Parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)”), because “the early-answer requirement of the MIDP *imposed unnecessary costs on parties who ultimately succeed on Rule 12 motions.*” E-mail from U.S. Courts, “Important Amendment to the Mandatory Initial Discovery Pilot (MIDP) Effective Dec. 1, 2018” (November 28, 2018, 04:54 CST) (emphasis added). The current case is exactly the type of case that this amendment should benefit, since the scope of the case will narrow significantly in light of Plaintiff’s Admissions. There is also a single claim asserted against the five non-Cambium Defendants that is subject to the Motion to Dismiss. If successful, it would completely eliminate these parties from the case.

Moreover, Plaintiff will not be prejudiced by an extension of the ESI production deadline. Plaintiff proposed that the deadline for completing fact discovery should be January 10, **2020**. Exhibit A to Rule 26(f) Report for Mandatory Initial Discovery Pilot (MIDP) (D.I. 32-1), October 12, 2018. Extending the ESI production deadline until after the Court weighs in on the appropriate scope of Plaintiff’s claims would not meaningfully impact Plaintiff’s proposed deadline. Additionally, Plaintiff may conduct discovery pursuant to the Federal Rules in the interim if it has concerns that certain ESI relevant to its claims will not be produced quickly enough. Thus, waiting until the Motion to Dismiss is ruled on will not be a burden on Plaintiff.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the default ESI production deadline set by the MIDP Standing Order be continued until 40 days after any amended pleading filed after the entry of an order resolving the pending Motion to Dismiss or 40 days after the order denying Defendants’ Motion to Dismiss, and that any production be limited to Plaintiff’s Admissions.

Dated: December 17, 2018

Respectfully submitted,

BAKER BOTTS, LLP

/s/ G. Hopkins Guy, III
One of their attorneys

G. Hopkins Guy III (CA Bar No. 124811)
hop.guy@bakerbotts.com
Jon V. Swenson (CA Bar No. 233054)
jon.swenson@bakerbotts.com
Karina Smith (CA Bar No. 286680)
karina.smith@bakerbotts.com
BAKER BOTTS L.L.P.
1001 Page Mill Road Building One, Suite 200
Palo Alto, CA 94304-1007
650.739.7500 (Phone)
650.739.7699 (Facsimile)

Andrew D. Wilson (DC Bar No. 1030144)
1299 Pennsylvania Ave. NW
Washington, DC 20004-2400
202.639.1312 (Phone)
202.508.9336 (Fax)
andrew.wilson@bakerbotts.com

Arthur J. Gollwitzer (06225038)
ajgollwitzer@michaelbest.com
James P. Fieweger (6206915)
jpfieweger@michaelbest.com
MICHAEL BEST & FRIEDRICH, LLP
444 West Lake Street, Suite 3200
Chicago, Illinois 60606
312.222.0800 (Phone)

*Attorneys for Defendants
Cambium Networks, Inc. et. al*

The undersigned, an attorney of record for the Defendants, hereby certifies that on December 17, 2018, a true and correct copy of the foregoing was served on counsel of record electronically via the Court's ECF system.

/s/ G. Hopkins Guy, III
G. Hopkins Guy, III

EXHIBIT 2

Swenson, Jon

From: Herrington, Beth <beth.herrington@morganlewis.com>
Sent: Monday, December 17, 2018 7:51 AM
To: Fieweger, James P (35849)
Cc: Guy, Hop; Swenson, Jon; Gollwitzer, Arthur III (73161); Bertin, Robert C.
Subject: RE: Call

Jim and Jon --

For today's call, we'd also like to discuss the following issues:

1. Mandatory disclosures of both parties – We propose both parties supplement by Thursday December 20. Set forth below are deficiencies in defendants' disclosures.
2. We propose ESI production be set at 40 days from December 20.
3. Defendants' motion to delay disclosures – We would oppose this motion as all defendants are alleged to have breached Ubiquiti's license agreements, hacked and made unauthorized use of the Ubiquiti firmware. Non-Cambium defendant's access to, copying, and unauthorized use of Ubiquiti firmware are at issue in the same way as Cambium defendants.
4. The protective Order (PO)– Defendants propose to set a date of January 8th for finalizing the PO.
5. ESI – we need to put a date on the calendar to discuss and finalize to ESI procedures. We propose finalizing the procedures by December 21.

With respect to Mandatory disclosures, each Defendant's disclosures are severely deficient. We expect that each defendant will fix these deficiencies by next Friday.

Deficiencies each Defendant needs to address in Mandatory Disclosures:

Rather than identify individuals, facts and events associated with each Defendant's access to and use of Ubiquiti firmware, role in the development, testing and promotion of Elevate and the reverse engineering and other violations of Ubiquiti's firmware license agreements, Defendants attempt to conceal people and events by not disclosing people or underlying facts and legal theories and making conclusory, false statements about the nature of Elevate. In most instances, Cambium identifies relevant documents as being in the possession of Ubiquiti and not defendants. This must be fixed in a supplemental response. Specific examples are provided below.

Blip Networks

1. Blip has not disclosed the identify of persons that downloaded or installed Ubiquiti firmware or participated in hacking with Elevate firmware on its network.
2. Blip has not stated any facts related to its testing or installation of Elevate, how it came into possession of Elevate before Elevate was released to the public or what legal basis it has for breaching the Ubiquiti license agreements, copying and making unauthorized use of Ubiquiti code and making unauthorized access to portions of the firmware that remain on Ubiquiti devices after hacking with Elevate.

Cambium parties – we need witnesses and facts from both Cambium defendants, not just one.

3. Cambium Networks has not identified anyone at the company that downloaded or installed Ubiquiti firmware on M-series devices.
4. Cambium has not identified individuals at the company that installed or tested Elevate firmware on Ubiquiti devices.
5. Cambium has not identified all individuals at the company involved in hacking Ubiquiti devices at live demonstrations, at customers and otherwise at the company.
6. Cambium has not identified individuals who made decisions to violate Ubiquiti's copyrights and trademarks and create false promotional materials encouraging hacking Ubiquiti firmware with Elevate.
7. Cambium has not identified any individuals who evaluated Ubiquiti's firmware license agreements and whether actions taken by Cambium violate those agreements.
8. Cambium has not identified individuals responsible for maintaining the lab of Ubiquiti equipment and firmware pictured in Cambium's webinars promoting hacking Ubiquiti's M-series devices.
9. Cambium has not identified individuals with knowledge of Cambium's licensing program to license Elevate to Ubiquiti customers.
10. Cambium has not set forth any facts related to the timeline and individuals involved in reverse engineering and hacking Ubiquiti's firmware and bringing Blip and Wincomm into the program to promote and license Elevate. Cambium states no facts about its unauthorized downloading and use of Ubiquiti's firmware, or Elevate's copying and unauthorized use of portions of Ubiquiti firmware after Elevate hacks Ubiquiti devices.
11. Cambium's affirmative statements suggesting that Elevate erases and replaces Ubiquiti's firmware is false. Cambium needs to fix these false statements and provide the actual underlying facts.

Wincomm

12. Wincom has not identified all individuals who were involved in its live hacking demonstrations of Ubiquiti's firmware with Elevate.
13. Winncom has not stated any facts related to its hacking of Ubiquiti firmware, promotion and licensing of Elevate to Ubiquiti customers.

Dmitry Moiseyev, Sakeed Ahmed

14. Defendants Dmitry Moiseyev, Sakeed Ahmed have not provided facts regarding their communications and involvement in reverse engineering and violating Ubiquiti's firmware license agreements, violating Ubiquiti's copyrights in firmware, the extent of their involvement in hacking the Ubiquiti firmware with Elevate and the false advertising and promotion of Elevate.

The categories of documents identified are deficient, and must include at least the following documents in each Defendant's possession, custody or control:

Ubiquiti AirOS firmware for M-series devices that each Defendant has accessed, copied and/or used.

Communications regarding Ubiquiti firmware or devices and Elevate internally at each Defendant, among and between Defendants and with third parties.

Log files of downloads of Ubiquiti firmware by each defendant.

Copies of all or portions of Ubiquiti firmware code.

All intermediate work product created in deriving Elevate.

All memos and communications regarding Ubiquiti's license agreements.

All memos or communications on the propriety of developing and using Elevate on other manufacturer's hardware including Ubiquiti M-series devices.

Documents on the development, configuration and functionality of Elevate.

Documents on hacking Ubiquiti m-series devices with Elevate and the number of installs of Elevate and customers affected.

Documents on market share, business plans and promotions involving Elevate and all sales associated with elevate.

Documents on licenses to customers of Elevate

Thanks—
Beth

Beth Herrington

Morgan, Lewis & Bockius LLP

77 West Wacker Drive | Chicago, IL 60601

Direct: +1.312.324.1445 | Main: +1.312.324.1000 | Cell: +1.312.543.8291 | Fax: +1.312.324.1001

beth.herrington@morganlewis.com | www.morganlewis.com

Assistant: Rhoda Morris | +1.312.324.1157 | rhoda.morris@morganlewis.com

From: Fieweger, James P (35849) <jpfieweger@michaelbest.com>

Sent: Wednesday, December 12, 2018 1:34 PM

To: Herrington, Beth <beth.herrington@morganlewis.com>

Cc: hop.guy@BakerBotts.com; jon.swenson@bakerbotts.com; Gollwitzer, Arthur III (73161) <agollwitzer@michaelbest.com>

Subject: Call

[EXTERNAL EMAIL]

Beth

Let me know if there is a time Friday after 11:00 CST that we can talk to address (1) the sufficiency of Ubiquiti's initial disclosures and (2) applying the amended MIDPP order to our case.

James P. Fieweger

Partner

E jpfieweger@michaelbest.com

T 312.596.5849 | **M** 312.259.4913 | **F** 312.222.0818

 **Michael Best** A LexMundi Member
Michael Best & Friedrich LLP
[my bio](#) | [our firm](#) | [vCard](#)

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EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UBIQUITI NETWORKS, INC.,
Plaintiff,

-vs-

CAMBIUM NETWORKS, INC.,
CAMBIUM NETWORKS, LTD.,
BLIP NETWORKS, LLC, WINNCOM
TECHNOLOGIES, INC., SAKID
AHMED, and DMITRY MOISEEV,

Defendants.

Case No. 18 C 5369

Chicago, Illinois
December 11, 2018
9:10 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

For the Plaintiff: MORGAN LEWIS & BOCKIUS, LLP
BY: MR. ROBERT C. BERTIN
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004-2541
(202) 373-6672

MORGAN LEWIS & BOCKIUS, LLP
BY: MS. ELIZABETH B. HERRINGTON
77 West Wacker Drive
5th Floor
Chicago, Illinois 60601
(312) 324-1000

Court Reporter:

CHARLES R. ZANDI, CSR, RPR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone: (312) 435-5387
email: Charles_zandi@ilnd.uscourts.gov

1 APPEARANCES: (Continued)

2 For the Defendants: BAKER BOTTS, LLP
3 BY: MR. HOPKINS GUY
4 MR. JON V. SWENSON
5 1001 Page Mill Road
6 Bldg. 1, Suite 200
7 Palo Alto, California 94304
8 (650) 739-7510

9 MICHAEL BEST & FRIEDRICH, LLP
10 BY: MR. JAMES P. FIEWEGER
11 444 West Lake Street
12 Suite 3200
13 Chicago, Illinois 60606
14 (312) 222-0800
15
16
17
18
19
20
21
22
23
24
25

1 (Proceedings heard in open court:)

2 THE CLERK: 18 C 5369, Ubiquiti Networks, Inc., v.
3 Cambium Networks, Inc., et al.

4 MS. HERRINGTON: Good morning, your Honor. Beth
5 Herrington on behalf of plaintiff Ubiquiti.

6 MR. BERTIN: Rob Bertin on behalf of Ubiquiti.

7 MR. FIEWEGER: Good morning, your Honor. Jim
8 Fieweger on behalf of Cambium.

9 MR. GUY: Hopkins Guy, Baker Botts, for Cambium.

10 MR. SWENSON: Jon Swenson from Baker Botts also for
11 Cambium.

12 THE COURT: Good morning. So, we're here for a
13 status hearing, and there's also a fully briefed motion to
14 dismiss. Were the parties able to serve their mandatory
15 initial disclosures last week?

16 MR. GUY: Yes, your Honor.

17 MS. HERRINGTON: Yes, your Honor.

18 MR. BERTIN: Yes.

19 THE COURT: Any issues that you need to raise with
20 me?

21 MR. GUY: Yes, your Honor.

22 THE COURT: Okay.

23 MR. GUY: They listed only one witness, your Honor.
24 Despite a -- some 69-page claim with 398 paragraphs in it,
25 they only listed one migrating employ. They did not list the

1 author of any copyright, nor did they list any witness who had
2 any knowledge of any of the contracts in the case.

3 So, they've listed one witness, your Honor, and
4 they've indicated that there is -- that they will indicate
5 on -- designate an expert in the future.

6 We think this is rather unusual because I think that
7 the entire motion to dismiss is -- the last question the Court
8 had, "Can't this be done with discovery," I think the point is
9 we don't even have a named witness who has knowledge or
10 discoverable information regarding their copyrights, their
11 contracts, or any of these things, other than this one
12 employee.

13 THE COURT: Okay. Have you had a chance to talk with
14 the plaintiff about this issue?

15 MR. GUY: It's been raised, your Honor, but it was
16 filed about a week ago, I believe -- actually, six days ago.

17 THE COURT: Okay. So, are you -- have you reached
18 out to the plaintiff?

19 MR. GUY: Yes, we have. We've objected, and it is in
20 process; but that is the current status of it, your Honor.

21 MR. BERTIN: This is the first we've heard of that.
22 We're happy to supplement and provide additional people, but I
23 had no idea that -- that they had this objection.

24 MR. GUY: Well, we do have this objection, your
25 Honor. I thought my office had communicated that objection.

1 THE COURT: All right.

2 MR. GUY: I have the disclosure with me. It's clear
3 that they only listed one -- they listed basically our
4 defendants, individuals, and they listed this one witness; and
5 they did not list -- I don't think that's in dispute. They
6 did not list the author of any copyright, any source code, nor
7 did they list anybody who has knowledge, firsthand knowledge
8 of negotiating the GNU license or negotiating any of their
9 licenses.

10 THE COURT: Okay.

11 MR. BERTIN: We can certainly identify developers in
12 a supplemental disclosure that we send to the other side.

13 THE COURT: And so under the -- you may be operating
14 under a Rule 26(a)(1) frame. Yeah, 26(a)(1) requires the
15 parties to disclose anybody that they intend to use, any
16 witness that they intend to use to support their claims or
17 defenses. And maybe you just want to use one person, and
18 that's fine.

19 But the MIDP disclosures are broader than that, and
20 they require not just the people that you want to use, but
21 also anybody with knowledge of -- you know, material knowledge
22 of the material underlying facts.

23 So, I don't know. Maybe Ubiquiti's a one-person shop
24 and there's just one person; but if not, you'll probably want
25 to supplement. It's premature at this point for me to give a

1 ruling, and I haven't been asked for a ruling; but I imagine
2 you'll be having discussions in the near term about that.

3 MS. HERRINGTON: Certainly.

4 MR. GUY: Yes.

5 THE COURT: Anything else about the MIDPs that we
6 need to discuss?

7 MR. GUY: Your Honor, I do want to make sure that
8 we're clear. We have an amendment to the MIDP rules. We
9 would prefer that our -- that any disclosure, further
10 disclosure be done, I think it's 40 days after the ruling on
11 this motion. I think we would ask that we be underneath the
12 recent amended rule change.

13 MR. BERTIN: Sorry.

14 THE COURT: Yes, go ahead.

15 MR. BERTIN: Okay. The only thing I would say is
16 that, you know, similarly, under their disclosures, they
17 haven't identified anybody that works at the company that has
18 written any source code for the company. So, the same thing
19 is present in their disclosures.

20 They have identified three people at an Eastern
21 European software shop; and just in terms of the status
22 conference, if they're the only people that worked on the
23 code, I just want to be mindful of that from a scheduling
24 standpoint because we may be doing Hague -- Hague discovery
25 and things like that.

1 But I thought that they might have had the director
2 of engineering or, really, anybody else at Cambium as part of
3 the disclosures, and they weren't there. So, I don't know how
4 much discovery we're going to be doing in Eastern Europe.

5 THE COURT: All right.

6 MR. BERTIN: And I assume that there's somebody at
7 the company that has been involved in software development.
8 We'll be talking about that as well.

9 MR. GUY: Your Honor -- I'm reading from our
10 disclosures here. One of the named defendants, Sakid Ahmed,
11 and Dmitry Moiseev were both indicated as they have
12 information relevant to the high-level development of the
13 Elevate firmware and related installation process. And same
14 with respect to Moiseev likely has information relevant to the
15 engineering design and operation --

16 THE COURT: If you can slow down just a little bit
17 for our court reporter.

18 MR. GUY: Okay. So, the operation of Elevate
19 firmware and related installation process.

20 So, the design was done. It did go out to the
21 Ukraine for implementation, and I would agree with counsel
22 that we are going to have some issues with discovery in the
23 Ukraine. I mean, they are not -- we do not have control over
24 them.

25 THE COURT: Are they employees of Cambium?

1 MR. GUY: No.

2 THE COURT: But they're vendors of Cambium?

3 MR. GUY: They did -- we did pay them in order to do
4 the code, yes. They were outsourced.

5 THE COURT: Is there an ongoing relationship?

6 MR. GUY: There is something of a relationship, and
7 we are attempting to reach out to them at this point; but we
8 have not gotten confirmation that they will make these
9 witnesses available and provide us the documentation.

10 THE COURT: Okay. Well, we'll cross that bridge when
11 we come to it, but if you -- if Cambium has some sort of
12 ongoing relationship with these Ukrainian coders, I have to
13 imagine that the Ukrainian coders would cooperate as a
14 condition of a continuing relationship with Cambium. And that
15 may be how we do it. In other words, ultimately, it may be on
16 Cambium to grease the wheels as to the non-parties with whom
17 it continues to have a business relationship; but again, we're
18 not quite there yet.

19 So, anything else about -- so, we had the request for
20 putting off the MIDP disclosures -- or at least the production
21 of documents until 40 days or 30 days after the resolution of
22 the motion to dismiss. It raises -- it sounds like a simple
23 request, and it is, viewed through a certain lens. At the
24 same time, the purpose of the MIDP is not to create a
25 PSLRA-type regime for discovery, where there's an effective

1 discovery stay pending resolution of a motion to dismiss.

2 So, I don't want -- what I don't want to happen is
3 that there's no discovery or no document discovery pending
4 resolution of the motion to dismiss because that would mean
5 that under the MIDP, there's less discovery rather than more
6 discovery, and that's just -- was not the purpose of the MIDP
7 or the amendment to the MIDP.

8 So, maybe the solution is that formal MIDP document
9 production doesn't take place, but everything else is fair
10 game, absent a further order of the Court.

11 And there are some circumstances pre-MIDP in
12 non-PSLRA cases where there was a motion to dismiss and a
13 request to stay discovery pending resolution of the motion to
14 dismiss where it made sense to do that, so I'm not saying it's
15 impossible or out of the question. But it would require -- it
16 would require a motion and a showing why this case is
17 different, is not -- is different from most other cases in
18 terms of having a motion to dismiss proceed simultaneously
19 with ordinary discovery on the assumption that the MIDP
20 disclosures will be put off.

21 So -- and the amendment is new, so all of this hasn't
22 really been worked out yet. So, I guess the bottom line is
23 figure out what you'd like and -- in terms of not just MIDP,
24 but also ordinary discovery; and file a motion requesting the
25 relief that you want, although not until you talk with the

1 plaintiff and get the plaintiff's view. And maybe it's an
2 agreed motion. Maybe it's not. But I would do the Local
3 Rule 37.2 consultation before any -- any such motion is filed.

4 So, anything else about discovery or MIDPs?

5 MR. GUY: None from the defendants, your Honor.

6 MR. BERTIN: None from the plaintiffs, your Honor.

7 THE COURT: So, let's go to the motions to dismiss.

8 I'm going to give the plaintiff a chance to have the first
9 word here in court, given that the defendants had the last
10 word in writing during the briefing schedule. Let me just --
11 for what it's worth, and it may not be worth anything, let me
12 give you my tentative thoughts. And it's not really a bottom
13 line thought. It's more of a process thought.

14 What I read as the main thrust of the motion to
15 dismiss, so it was definitely the lead of the motion to
16 dismiss, was the complaint is alleging just deletion of
17 software, not modification or copying. None of the law --
18 statutes or common law doctrines asserted by the plaintiff
19 prohibits deletion; and, therefore, the complaint doesn't
20 allege a violation of law.

21 That was really the main thrust of -- at least from
22 my view, the main thrust of the motion. Then in the response
23 brief, the plaintiff said, "What are you talking about? The
24 complaint doesn't just allege deletion. It also alleges
25 modification and copying, and here's why modification and

1 copying is covered by the Copyright Act and all of the other
2 doctrines that were -- the legal theories that were set forth
3 in the complaint."

4 And then in the reply brief, the defendant said,
5 "Well, you're forgetting about the GPL, the general public
6 license; and the general public license allows us not just to
7 delete, but also to modify and copy."

8 I think the GPL was discussed in the opening brief;
9 but if it was intended to be the lead, and I think it turned
10 out to be the lead, at least in the reply brief, the lead was
11 a bit buried in the opening brief.

12 But that said, I don't think it was forfeited.
13 I think it was presented in the opening brief. And I'm
14 wondering if the plaintiff can address the arguments in the
15 reply regarding the GPL, as well as anything else that you'd
16 like to address.

17 MR. BERTIN: Yes. Thank you. Thank you, your Honor.
18 We are sort of having a big merits dispute on the complaint at
19 this stage; and, you know, we think for all of the reasons
20 stated in our opposition that there's sufficient factual
21 allegations to establish, notwithstanding the GPL,
22 infringement.

23 On your specific question about GPL, essentially,
24 what they've argued in the reply is that because there's some
25 GPL code on this embedded device's firmware, that that excuses

1 all conduct with respect to the whole of the program. And
2 they've also alleged that that's the case in part because we
3 haven't allegedly identified anything that's proprietary
4 within the firmware, but that's not the case.

5 So, we've identified a user interface that's
6 proprietary. And, for example, Exhibit J to the complaint
7 shows our proprietary user interface. We've talked about the
8 user interface in the complaint and --

9 THE COURT: Is the user interface separate and apart
10 from the software or from the firmware that Ubiquiti installs
11 on the hardware?

12 MR. BERTIN: It's part of the installation of the
13 hardware, user interface code, but it's a distinct program
14 from other programs that are part of the firmware, much like
15 Microsoft Office has Microsoft Word and Power Point and other
16 things, and even Microsoft Windows has multiple programs like
17 printer drivers and display drivers and other things that are
18 distinct.

19 And, for example, with respect to copyright
20 infringement, they point only to their use of Elevate and its
21 copying and modifying of certain things as being excused by
22 the GPL; but the complaint also alleges copyright infringement
23 by their violating the license agreement and then continuing
24 to use and demonstrate the Ubiquiti program itself in live
25 hacking demonstrations showing how to install Elevate. And

1 during those demonstrations, for example, in the webinar,
2 they're publicly displaying and publicly performing the user
3 interface software, our user interface software, and showing
4 people how to bring it up and then download the Elevate
5 software and then type that in to our user interface.

6 So, that's just one example of the part of the code
7 that is infringed, and it's something that we keep kind of
8 harping on; but they try to indicate narrowly what the
9 copyright infringement is.

10 THE COURT: Does the user interface code incorporate
11 at all the public use code?

12 MR. BERTIN: No.

13 THE COURT: But there are parts of the Ubiquiti
14 firmware that does incorporate the public use code?

15 MR. BERTIN: Parts of the firmware on the device,
16 yes. For example, there's a Linux-type kernel on the device.
17 Many companies make proprietary software for embedded devices
18 that run on Linux, and Ubiquiti is no different. They make --
19 they use leveraged Linux, and they also have programs that run
20 on Linux that are distinct.

21 THE COURT: So, is Cambium right that if you take
22 public source software and create something with it, whatever
23 it is you create also has to be public source, and there's --
24 you basically grant the license to everybody to use it? Isn't
25 that kind of the whole point of open source software?

1 MR. BERTIN: That's not the whole point of open
2 source software *per se*. It is in part. Like, for example, if
3 you make an open source program and then I want to make an
4 improved program, anything I do to that program that you've
5 put out there in open source, anything I do to modify that
6 program is going to be open source, and I'll have no claim
7 to it.

8 But this is a multi-billion-dollar industry now, with
9 people introducing, you know, proprietary, you know, code that
10 works with open source code and so forth.

11 And what it comes down to -- and their brief kind of
12 conflates some of these issues, but for example, Ubiquiti can
13 add to the open source code by creating an entirely new
14 program and then release it to be part of the open source
15 program so that it works together with the program. So,
16 they'll own the copyright in that, but then they've licensed
17 it to the world by combining it with these other programs.
18 Okay?

19 But they can also modify somebody else's program
20 that's included in open source work, and then Ubiquiti would
21 actually own those modifications; but nevertheless, they'd be
22 subject to open source licensing.

23 And then Ubiquiti and others can create new
24 proprietary programs that are distinct from open source that
25 maybe run on top of Linux that they'll own because they're

1 distinct programs.

2 And if you look at the -- we have this in a couple of
3 footnotes in our opposition brief, but if you look at the --
4 each of the open source licenses that defendants attach to
5 their motion, each of them addresses this -- this issue. And
6 what they basically say is that mere aggregation of a work,
7 of a program with an open source program -- yeah, here it is.

8 So, if you look at Exhibit 5, which is the GPL
9 version, too, at the very bottom of page -- at the very bottom
10 of page 2, which is in Section 2 of the license, it says, "In
11 addition, mere aggregation of another work not based on the
12 program with the program or with a work based on the program
13 on a volume of storage or distribution medium does not bring
14 the other work under the scope of this license."

15 And that's powerful because it allows people to --
16 to leverage open source, make contributions to open source,
17 but also keep some programs separate that also leverage that
18 open source, and so --

19 THE COURT: So, let's just get down to brass tacks.
20 So, what you're saying is that -- what I think you're saying
21 is that -- and please tell me if I'm wrong -- that the Cambium
22 software at issue in this case, some of it is derivative of
23 the public source software, and that stuff is not protected
24 because of the GPL; but there are other programs as part of
25 the suite of software programs that are not derivative of the

1 GPL and simply because those non-GPL-derivative programs --
2 I'm sorry, yeah, non-public-source-derivative programs are
3 presented together with public-source-derivative programs
4 doesn't mean that the GPL creates a license to use the
5 non-public-source-derivative programs?

6 MR. BERTIN: Yes.

7 THE COURT: Okay. So, what are the
8 non-public-source-derivative programs in Cambium's suite of
9 software that's at issue in this case? You've told me one,
10 which is the proprietary user interface. What's another one?

11 MR. BERTIN: Well, so, there's two -- there's two
12 separate factual scenarios, if I can -- one is what their code
13 includes from our code, let's say, or that's not part of GPL.
14 And the other is what our code includes that's not part of the
15 GPL.

16 So, the user interface is one. There's two things
17 that are specifically pled in our complaint, the configuration
18 code and the calibration code. Those are two things that we
19 allege are not part of the -- are not part of the GPL, and
20 we've alleged that Cambium has copied those and made
21 unauthorized use and access to those things.

22 Cambium has not disputed that those are not part of
23 the GPL.

24 THE COURT: Then where does the proprietary user
25 interface code fit in?

1 MR. BERTIN: That's something in our code, but it's
2 not in their code; but they commit copyright infringement
3 every time they publicly perform or publicly display our user
4 interface after breaching --

5 THE COURT: And that's alleged in the complaint?

6 MR. BERTIN: That's alleged in the complaint.

7 THE COURT: And then in terms of the configuration
8 code and the calibration code, this is something that you're
9 saying that Cambium incorporated into its own code?

10 MR. BERTIN: Yes. Yeah, they directly copied the
11 configuration --

12 THE COURT: So, we have the public performance of the
13 proprietary user interface during the webinars or the
14 seminars?

15 MR. BERTIN: Right, right.

16 THE COURT: And is there anything else that your
17 complaint alleges that is publicly performed but not
18 incorporated in the Cambium software?

19 MR. BERTIN: In terms of the public performance
20 rights, that's the main thing.

21 THE COURT: Okay. So, that's one bucket, and there's
22 one item in that bucket, which is proprietary user interface.
23 The second bucket is your code that you say Cambium
24 incorporates into its own code, but your code is not covered
25 by the GPL. And you've given me two examples, the

1 configuration code and the calibration code. Yes?

2 MR. BERTIN: Yes.

3 THE COURT: Are there any other examples?

4 MR. BERTIN: Yeah. Another example is the
5 proprietary AirMAX protocol that's mentioned in the complaint,
6 and then there's everything else. But those are specifically
7 called out as proprietary portions.

8 And again, every time that they, for example, use
9 our code, our whole firmware after breaching the license
10 agreement, they're -- they're making unauthorized use of our
11 copyrighted code; and that's an act of copyright infringement.

12 THE COURT: Okay.

13 MR. BERTIN: But those are the four matters.

14 THE COURT: If -- what is the proprietary user
15 interface software? Could you go to the code and say, "Okay.
16 These 1s and 0s are proprietary user interface"?

17 MR. BERTIN: Yes.

18 THE COURT: And can you go to your code and say,
19 "Here are the 1s and 0s that's configuration code, and here's
20 the 1s and 0s that are calibration code"?

21 MR. BERTIN: Yes. They're the same.

22 THE COURT: Do any of your claims depend on things
23 that are done to your code that is derivative of the public
24 use code?

25 MR. BERTIN: None of our claims depend on that. We

1 haven't asserted any GPL code, and we're not interested in
2 asserting any GPL code. There's plenty of proprietary --

3 THE COURT: I'm not talking about GPL code. You're
4 changing my question.

5 MR. BERTIN: Okay. I'm sorry.

6 THE COURT: I'm talking about stuff that you did that
7 is derivative of GPL code.

8 MR. BERTIN: Yeah, we're not asserting it.

9 THE COURT: You made it better --

10 THE COURT: Right.

11 MR. BERTIN: So you created a new thing.

12 MR. BERTIN: Right.

13 THE COURT: But you're not saying this new thing has
14 been infringed in any way?

15 MR. BERTIN: Yes, I agree with that characterization
16 as to that category.

17 THE COURT: Okay. I think now I understand what the
18 nature of your claim is and how you believe you defeat both of
19 their principal arguments, which is: One, all we have is
20 deletion, not modification or copying; and two, even if there
21 is modification and copying, it's covered by the GPL.

22 MR. BERTIN: Yeah.

23 THE COURT: And is that basically the gist of your --

24 MR. BERTIN: That's basically the gist it, your
25 Honor, yeah. If I could add one more thing.

1 THE COURT: Sure.

2 MR. BERTIN: And this just illustrates these issue,
3 but also having play into some other things. The
4 configuration code and the calibration code, they haven't
5 disputed that those are ours and not infected, let's say, with
6 the GPL.

7 What they've said with respect to those things is
8 that they're essentially primarily functional and, therefore,
9 not subject to copyright. At the same time, they've argued
10 various preemption claims and things like this. But if
11 they're asserting that the part of the code that they copied
12 is not subject to copyright protection, then how can they be
13 preempted by the copyright laws?

14 So, generally, preemption is something that's rarely,
15 if ever, considered at this stage of the case, because it's
16 the kind of thing where you need to wait to look at the actual
17 1s and 0s of each program that are alleged to infringe and the
18 extent of copying and this and that, and the extent of
19 arguments that, "Well, this isn't really copyrightable."
20 Well, then other things come into play.

21 We've alleged several reasons why preemption is not
22 applicable, but that's just one example of why at this early
23 stage it would be difficult to show preemption.

24 THE COURT: Okay. All right. Thanks. Before I turn
25 the microphone over to Cambium, sir, do you have a case that

1 was called -- do you have a case that was supposed to be
2 called at 9:00 o'clock?

3 MR. REDMOND: Thomas v. Dart.

4 THE COURT: Okay. Let's take a very quick break.
5 You can collect your thoughts.

6 So, why don't we call Thomas v. Dart.

7 (Recess had.)

8 MR. GUY: Re-approach, your Honor?

9 THE COURT: Yeah. We'll resume with Ubiquiti versus
10 Cambium.

11 All right.

12 MR. GUY: Thank you, your Honor. Let me take those
13 arguments in order, if I may. First of all, with respect to
14 the interface, if that -- if they are -- if they're saying
15 there are two copyright contract breaches here, and one of
16 them is the interface, then at paragraph 44 of their
17 complaint, they say, "The hacked firmware deletes portions of
18 Ubiquiti firmware and Ubiquiti user interfaces with Ubiquiti
19 M-series devices." So, in a motion to dismiss, that's taken
20 as true, and we agree that it does delete it.

21 So, if they are saying that they have some right in
22 the interface and it's a demonstration right under the
23 copyright or a performance right that they're saying that we
24 are in violation of that, then we would gladly accept their
25 amendment to that, and that will trigger a very specific

1 attack, again, under Section 109(a) of the Copyright Act, that
2 the Copyright Act cannot first of all give us the broad right
3 to delete, yet if we show people how to delete it, that's
4 somehow in violation of some other right. They have no right
5 to control that. And that's exactly where we'd be on that
6 issue.

7 But at a first step, you know, we would love to see
8 the amendment in which they restrict their claim to those two
9 points, one of them being the interface and the deletion
10 issue, and the second being some new code that they have with
11 regard to the configuration and I believe it was the -- they
12 referred to it as the calibration code.

13 So, let me get --

14 THE COURT: So, let's -- can we just focus on the
15 user interface for a second?

16 MR. GUY: Sure.

17 THE COURT: So, defense counsel is saying that
18 the principal allegation regarding the user interface is
19 paragraph 44, and all it alleges is deletion. Is there
20 something else alleged as to the user interface in the
21 complaint that counsel has not addressed?

22 MR. GUY: There is.

23 THE COURT: And if so, where is it?

24 MR. GUY: There is other mention of the interface,
25 but their admission that it is deleted is full stop under

1 Section 109. We have the right to delete it.

2 THE COURT: Well, no. Just because I say you punched
3 me in the face doesn't mean that you also didn't kick me in
4 the leg.

5 MR. GUY: But that would be a different right, your
6 Honor.

7 THE COURT: Paragraph 44 says that there's deletion
8 of a portion of the user interfaces. Maybe the complaint
9 alleges that other things are done with the user interfaces.
10 So, is there anything else that the complaint alleges that
11 Cambium does with the user interfaces?

12 MR. BERTIN: There's a lot of stuff that the
13 complaint alleges that Cambium does with the user interfaces,
14 but -- they allege the webinar --

15 THE COURT: So, paragraph numbers.

16 MR. BERTIN: Well, let's see. I want to start with
17 the actual copyright infringement, the fourth claim for relief
18 at page 53 of the complaint at paragraph 284. And it says,
19 "Cambium has directly infringed and will continue to infringe
20 Ubiquiti copyrights and Ubiquiti firmware by violating
21 Ubiquiti firmware license by making unauthorized copies and
22 use of Ubiquiti firmware."

23 THE COURT: If that's what you're relying on, it's
24 not going to get you where you need to go because that's just
25 a conclusory allegation -- two problems with it. One is it

1 doesn't reference the user interface, and second, it just is a
2 conclusory allegation of copyright infringement.

3 MR. GUY: We agree, your Honor.

4 If you could refer to the paragraph number.

5 MR. BERTIN: Yeah, thank you for that.

6 So, there's a whole section here, paragraph 62
7 through 71, where we talk about Cambium's unlawful promotion
8 and distribution of the hacked firmware. And, you know, here,
9 we talk about the materials where we induce them to make --
10 you know, to make modifications. Let's see here.

11 Yeah. So paragraph 71, "Cambium has continued to
12 heavily promote the hacked firmware in the United States or
13 elsewhere with additional webinars directed at WISPs and
14 marketing and distribution of literature and web pages through
15 third-party distributors, including distributors used by both
16 Ubiquiti and Cambium."

17 THE COURT: But again, there's nothing here about the
18 interface.

19 MR. BERTIN: Well, if -- I can continue to go through
20 this for a minute, but there's -- we -- we basically -- the
21 primary allegations in here are that in promotion that they've
22 done live -- live hacking, and --

23 THE COURT: Of what? Of the stuff that's covered by
24 the GPL or the other stuff?

25 MR. BERTIN: No, the user interface.

1 THE COURT: But you've got to allege that.

2 MR. BERTIN: It is alleged in here.

3 THE COURT: Well, show me. I'm giving you a chance.
4 Show me.

5 MR. BERTIN: So, paragraph 160 is another example.
6 So -- and there's -- okay. So, we talk about in this -- the
7 fifth bullet, "Cambium's November 30th webinar designed to
8 target Ubiquiti customers and provide a step-by-step procedure
9 for hacking the Ubiquiti M-Series firmware, which prominently
10 feature these two defendants which contain numerous
11 admissions." Okay. And then we also talk about Winncom
12 hosting an ePMP course, October 7th through 9th, at the
13 WISPAPALOOZA 2017 convention.

14 We have also attached a transcript of that webinar to
15 the complaint. Okay? And let me try to find the exhibit.
16 This is a partial transcript, Exhibit F to the complaint,
17 where they -- and we've also attached the quick-start guide to
18 the complaint, which is at Exhibit D. And the webinar refers
19 people to this quick-start guide, and they talk about
20 downloading the firmware, using a web browser to navigate to
21 the -- this is on page -- this is on page one, two -- 3 of
22 Exhibit D to the complaint, the quick-start guide, "Using a
23 web browser, navigate to the access point's default IP
24 address, 192.168.0.1. Log in to the access point web
25 management interface with username admin and password admin.

1 Navigate to Tools, Software, Upgrade, and click the Browse
2 button."

3 So, this is an example of the webinar going into our
4 device's user interface and instructing people how to apply
5 Elevate to it. And all of that is instructing people to use
6 our user interface, and they're using our user interface at
7 the time.

8 MR. GUY: If I may comment, your Honor.

9 THE COURT: Sure.

10 MR. GUY: So, your Honor, the massive problem that we
11 have, as this demonstrates, is you're picking paragraph 71 and
12 matching it with paragraph 160 and going back to Exhibit D.
13 And in between all of that is a much, much, much broader
14 claim. If they amend to this idea of a performance -- and
15 what I'm hearing is that they're objecting to the fact that we
16 show their user interface on page 3 and I guess page 4. If
17 that's the nature of their copyright claim, then all of a
18 sudden, we have a very narrow and very specific claim. And we
19 would invite that. We would appreciate the amendment and to
20 focus it on that. But that's not what we have in this
21 complaint.

22 Let me give you an example how this affects discovery
23 since the pleading will frame discovery. If the issue is
24 Exhibit D and this interface and not the code behind it, we
25 can say very easily that instructing someone how to delete

1 something is perfectly permissible. If showing them a picture
2 of their interface is the violation, then we delete the
3 violation. Damages are limited to that -- that picture, and
4 that's it. But the way they have it right now is it's
5 everything. It's all of their code. And I can demonstrate
6 that to you.

7 So, the question is: Do I have to produce millions
8 and millions of lines of code, or do I need to simply produce
9 Exhibit D?

10 THE COURT: Well, the millions and millions of lines
11 of code will come in the second bucket, which is the
12 configuration code and the calibration code.

13 MR. GUY: I'm chomping at the bit. Can I go ahead
14 and proceed with that?

15 THE COURT: Let me ask, is there anything else in the
16 complaint that you believe alleges public performance of the
17 user interface?

18 MR. BERTIN: Well, paragraph 24 talks about the user
19 interface, which provides an upgrade path for the firmware.

20 MR. GUY: Paragraph 24?

21 MR. BERTIN: Paragraph 24.

22 THE COURT: That doesn't allege public performance.

23 MR. BERTIN: Paragraph 37 -- well, we've alleged
24 unauthorized use of the code and the copyrights.

25 Paragraph 37 gets into devices, including user

1 interface, for Ubiquiti customers to configure. User
2 interface is accessed at the designated IP address. On the
3 first access, they're presented with a license agreement.

4 THE COURT: And the thing is -- I understand that
5 you're -- as a plaintiff, you're in a tough position, because
6 if you give too little, then you have a *Twombly/Iqbal* problem;
7 if you give too much, it's confusing. And you've got to --
8 it's hard to deal with those competing imperatives.

9 But at the same time, it can't be a scavenger hunt to
10 kind of figure out what your claim is. That causes a Rule 10
11 problem.

12 MR. BERTIN: I understand what you're saying. At the
13 same time, I feel like we provided more information, not less.
14 And we establish in our copyright count section, we're
15 alleging direct infringement for unauthorized use of our --
16 you know, of our copyrighted firmware, in addition to
17 indirect, contributory inducement. And it's all laid out.

18 And with respect to everything in here, you know, you
19 can't -- deleting the user interface is a -- is a breach of
20 our license agreement, and it says that in here on multiple
21 cases. We've quoted the language that says that. So,
22 deleting it is a breach of the agreement. That creates
23 copyright infringement just by their continuing to have the
24 code.

25 The next section that we cited of the license

1 agreement says once you breach the agreement, you have to
2 destroy all copies of our code. You can't keep it around.
3 So, anything that they're still keeping is copyright
4 infringement.

5 And it's not their code that they have to go fumbling
6 around trying to find. It's our code. They're keeping our
7 code. So, the copyright comparison is our copyright against
8 our own code that they're keeping and using and our user
9 interface and are they using it. And that's what's in here.
10 We're alleging direct, that they're infringing our code and
11 that they're breaching and that they're still using it. So,
12 it's not -- we were not playing hide the ball, and I think
13 that's very clear from here.

14 Now, do you have a requirement under the copyright
15 pleading rules to specifically mention public performance and
16 public display as one of the nine or so bundle of enumerated
17 copyrights? I'm not familiar with any case that says that.

18 What you do is you allege facts, and you allege
19 direct copyright, inducement, or contributory. And we've done
20 that, and we've done that in spades; and I've given you
21 multiple examples. And I don't think that not saying "public
22 performance" or "public display" is a deficiency, and I'm not
23 aware of any case that says that it is.

24 THE COURT: Well, you don't have to utter -- a
25 complaint doesn't have to set forth legal theories. That's

1 right. But you do have to explain factually what it is that
2 the defendants did to violate the copyright or the DMCA or
3 whatever it is that you're alleging.

4 (Bench conference, not reported.)

5 THE COURT: Okay. We're going to take one more
6 break, and then I'm going to turn the microphone back over to
7 the defendant.

8 (Recess had.)

9 THE CLERK: 18 C 5369, Ubiquiti Networks, Inc., v.
10 Cambium Networks, Inc., et al.

11 THE COURT: All right. So, if there's anything else
12 you want to say about the user interface, I want to give you
13 that chance; and then I know you want to address the second
14 group of items, which is the use of the configuration code and
15 the calibration code.

16 MR. BERTIN: Your Honor, can I just give you a couple
17 of additional paragraphs, if you don't mind.

18 THE COURT: Sure. Yeah, let's just get everything on
19 the table so defendants know what you're alleging.

20 MR. BERTIN: Okay. So, paragraph 93, this whole
21 section is right on point because it's talking about the
22 promotion of the hacked firmware. But 93 talks about the
23 webinar, the November 30th, 2016, webinar.

24 "The webinar directs viewers of the Cambium website
25 to download the hacked firmware and provides instructions on

1 how to navigate the Ubiquiti web user interface driven by
2 Ubiquiti firmware on Ubiquiti M-Series devices in order to
3 replace the Ubiquiti firmware with Cambium hacked firmware."

4 The next paragraph talks about how in the webinar,
5 they talk about supporting XW-based Ubiquiti hardware.

6 And then paragraphs 108, they talk about Cambium
7 promoting its quick-start guide during its November 30th,
8 2016, webinar targeting Ubiquiti customers, stating that
9 Cambium strongly recommends viewers read their quick-start
10 guide.

11 And then paragraph 110 talks about Cambium releasing
12 the quick-start guide instructing Ubiquiti customers on steps
13 to download the hacked firmware from the Cambium website and
14 install it through the web user interfaces driven by Ubiquiti
15 firmware on M-Series devices.

16 THE COURT: Okay. All right. The floor is yours.

17 MR. GUY: Thank you, your Honor. I would completely
18 agree with the Court that that is a scavenger hunt, and I want
19 you to know that I did not understand that to be the nature of
20 their copyright claim, that the idea that they are pointing to
21 a browser image as part of a copyright claim which is a
22 performance right and that that is one of their claims, that
23 is not in their complaint. And our main focus here is the
24 overbreadth of this complaint. And we would gladly accept an
25 amendment that goes directly to that. And we believe that we

1 are entitled to that, and we have just demonstrated why that's
2 essential.

3 If I can move to responding to the -- what they refer
4 to as the configuration and calibration code, unless there are
5 any questions by the Court.

6 THE COURT: No. Go ahead.

7 MR. GUY: Okay. With respect to the configuration
8 and calibration code, I believe he said that three times, the
9 complaint does not refer to it as that. It doesn't use the
10 word "code." We just searched it. The word "calibration
11 code," we couldn't find, nor could we find "configuration
12 code."

13 What they do call out is something called
14 configuration or calibration information. And the point is
15 that this is something that we believe that if they were
16 required to define what that is, then they have no right
17 to it.

18 And again, we have the same problem as before, that
19 it's super broad, and we don't really -- you know, this is a
20 needle in a haystack; and we've just found perhaps what
21 they're now calling one of their needles, which is this idea
22 of configuration/calibration code. That's different than
23 what's in their complaint. They talk about information. They
24 don't have a right to claim a copyright in information.

25 Now, if I can, your Honor, just so you understand

1 this overbreadth issue, we've got -- I just want to show you
2 one graphic. It's stapled together. If I can hand this up.

3 THE COURT: Of course.

4 (Tendered.)

5 MR. GUY: And so the overbreadth is that they
6 constantly refer -- if you can just refer to page 4 -- I'm
7 sorry, page 3. And I'll be brief. This isn't a long
8 presentation.

9 This is a quote from Exhibit B to the complaint.
10 This is their firmware license. And if you go through the
11 complaint, what they do is they talk about Ubiquiti firmware
12 or their firmware, and they talk about it with a little "f"
13 firmware. Then they quote -- about paragraph 37, I believe --
14 38, excuse me, they quote language from this agreement.

15 And then after that, they never define the term
16 Ubiquiti capital F Firmware in the complaint, but they start
17 using Ubiquiti capital F Firmware about 100 times after
18 paragraph 38. And if you go to the contract they were
19 quoting, you see how broad Ubiquiti firmware is. It means the
20 firmware in object code form made available on Ubiquiti on --
21 or Ubiquiti devices. It's everything.

22 But in that same agreement, your Honor, they also
23 define open source software means, "Any software or software
24 component module or package that contains" --

25 THE COURT: If you can slow down just a bit.

1 MR. GUY: I'm sorry. That was a perfect place to
2 slow me down. Thank you.

3 (Continuing) -- "or is derived in any manner (in
4 whole or in part) from, any software that's distributed as
5 free software, open source software, or similar licensing,"
6 and so forth.

7 So, this is in the agreement that they attach to the
8 complaint.

9 So, at a threshold, they not only cannot claim
10 anything that is subject to a GPL license, but that means not
11 only the code that is -- you know, that they copy and is there
12 verbatim, but anything that is derived in any manner from it.

13 And so that's the overbreadth that the -- in two
14 ways. What you just heard was a recasting of that a little
15 bit narrower. They want to suggest that it's not -- well, it
16 could be derived, but it can be new. Well, if they take
17 something and they derive it and it's new, it's still derived.
18 So, there is a point there.

19 You know, if we -- we would ask that the complaint
20 be limited basically by their own definition of open source
21 that anything in this case cannot include the open source
22 software. I think you just heard him say that, but that is
23 not what's in the complaint.

24 Now, going on to the -- addressing the
25 configuration/calibration code specifically, I point out that

1 the word "code" is not there. They talk about it in terms of
2 information. And, you know, they don't have a copyright on
3 information. So, if they were required to spell out
4 specifically what that is, is it code, or is it information?
5 We're now in conflict on what that is.

6 Code is not in the complaint. Information is. You
7 can't copyright information. You can't copyright the phone
8 numbers for people in a phone directory. You may be able to
9 copyright a specific font size and presentation or formatting
10 of a phone book, but you can't copyright the information.

11 So, at a point here, they've already changed, if you
12 will, what their complaint literally says. They've switched
13 it from information in response to our motion to something
14 called code. Well, if that's the case, then we would like to
15 see two things: Identifying what that code is or what those
16 calibration parameters are.

17 What we believe they are is nothing more than the IP
18 address for the device, the name of the device, its power
19 setting, and things like that. And they have no copyright.

20 So, we'd ask, you know, that they need to be more
21 specific to lay out a claim, because when they put a complaint
22 forward that simply says calibration and configuration
23 information, that is not copyright protectable under the
24 Copyright Act.

25 Your Honor, those are my comments with respect to

1 those two buckets.

2 THE COURT: Okay. Very good. Any final thoughts?

3 MR. BERTIN: Yeah. I think it would be news to a lot
4 of people in the world if information is not copyrightable.
5 There are --

6 THE COURT: Isn't it the expression of information
7 and not the information itself that's copyrightable?

8 MR. BERTIN: Well, information includes -- includes
9 the expression; but, yes, expressions of information,
10 information is copyrightable.

11 THE COURT: No. You just said two completely
12 different things.

13 MR. BERTIN: Well, I'm agreeing with you that an
14 expression of information is copyrightable.

15 THE COURT: Okay.

16 MR. BERTIN: Okay. But -- okay. In terms of -- in
17 terms of this being a wide-open exercise, we've asserted --
18 which it's not, we've asserted two very specific versions of
19 Ubiquiti copyrights that are infringed, the registered
20 versions 5.2.1 and 5.3. We've -- the registrations
21 themselves, which are attached to the complaint, exclude
22 license and materials, previous versions. And they're
23 directed to new and revised computer code. It's not an
24 open-ended exercise.

25 And we've identified already several things. We've

1 identified configuration and calibration information, which is
2 part of the firmware code, in our -- in our complaint. We've
3 identified user interface in our complaint. We've identified
4 the AirMAX radio. And we've identified that when they --
5 we've identified multiple ways in which they've directly
6 infringed our copyright. And we've also identified inducement
7 and contributory infringement in here.

8 But in terms of the copyright infringement, we've
9 given several examples. So, they breached by
10 reverse-engineering, by copying, by modifying, by changing or
11 deleting the user interface. And all of these are laid out.
12 I mean, we've locked into the complaint the provisions of the
13 agreement, license agreement that they're violating.

14 All use of our firmware after that is in violation of
15 our copyright. They were supposed to destroy it and not use
16 it. They haven't done that. In fact, they're using it --
17 they're running around using it all over the place including
18 in demonstrations. That's unauthorized use of our copyrighted
19 code.

20 So, we've identified multiple sections. We've
21 identified public display and public performance. We've
22 identified unauthorized use of our code by using the user
23 interface. And we've identified how they've induced people to
24 use their code, which copies portions of our code, deletes
25 others, causes them to violate our license agreements, and

1 numerous -- numerous other things.

2 THE COURT: 5.2.1 and 5.3, do each of those encompass
3 just one program, or are there many programs?

4 MR. BERTIN: There are many programs that are part of
5 it.

6 THE COURT: Some of which are GPL, and some of which
7 are not?

8 MR. BERTIN: Yes.

9 THE COURT: All right. Any final thoughts as the
10 movant?

11 MR. GUY: Your Honor, I think he just admitted the
12 major point, which is he now admits his complaint did say
13 information, and I think at -- and the Court is correct, you
14 do not have a copyright protectable interest in information.
15 It has to be an original expression, and they need to proceed
16 on that original expression.

17 What we have is a complaint that does not define or
18 present that original expression, and instead, what we have is
19 some vague reference to information.

20 So, again, I think this could be solved, give them
21 the option, certainly the out, to amend, to narrow it.

22 But our biggest concern -- we are incredibly happy to
23 hear that this is what the case is about, believe me, because
24 it is so much narrower and so much more limited than basically
25 everything that's in the code, and that is currently what the

1 pleadings look like.

2 So, we'd definitely ask the Court that the motion to
3 dismiss should be granted. We are not opposed to granting
4 leave to amend to these narrower points, but they don't get --
5 they certainly don't get to come in to this court and claim
6 that they're entitled to a copyright protectable interest in
7 calibration or configuration information. That is just wrong
8 as a basic tenet of copyright law.

9 So, I'll leave it with that. Thank you, your Honor.

10 THE COURT: Okay. Let's say -- I don't know what I'm
11 going to do with this, but let's say that I agree with you and
12 they come in with a much more streamlined -- Ubiquiti comes in
13 with a much more streamlined complaint. I'm not going to get
14 a 12(b)(6) saying, "There isn't enough here," because then
15 you're just being Lucy to his Charlie Brown.

16 MR. GUY: I'm sorry. I thought you said Lucy to his
17 Charlie Brown.

18 THE COURT: I did.

19 MR. GUY: Okay. I got it.

20 THE COURT: With the football and the kicking.

21 MR. GUY: Your Honor, if they limit their complaint
22 to what has just been described, that they are going to
23 identify what this protectable configuration code is and
24 identify that and also the specifics of the browser that are
25 being used when we instruct people to delete, if those two

1 were the limits, I think that would be the end of it, and we'd
2 proceed with the case.

3 That leaves open the idea that we can move for
4 summary judgment, and we'll ask the Court that perhaps they
5 entertain an earlier motion, if we can. I think that's what's
6 happened in a number of these cases. But from a pleading
7 point of view, I think we've done our job.

8 THE COURT: Okay. Any final thoughts?

9 MR. BERTIN: Yeah. Yes, your Honor. In terms of the
10 configuration information which is part of our firmware and
11 the calibration information which is part of our firmware,
12 there's no basis to decide anything about that. We haven't
13 seen the code. We haven't talked about the code. We've
14 alleged that they've infringed it, but we haven't examined the
15 code.

16 And in these cases, for example, the *Computer*
17 *Associates versus Quest* case that we cite and talk about in
18 our brief, I mean, it's after preliminary injunction
19 proceeding where experts have weighed in, and the court at
20 that stage many months in to the case has said notwithstanding
21 the fact that there's open source parts of the code, there's
22 stuff here that is likely to be infringed, and the case
23 proceeds.

24 We are really at the outset of the case. We've
25 produced a very detailed complaint that looks at -- and

1 provides exactly factually what their device does at each
2 stage, and it's well-supported. We haven't even looked at the
3 calibration information or configuration information, which is
4 part of our code. And it looks like code. In the case of,
5 for example, the configuration information, we have a
6 configuration partition, which is where this stuff resides,
7 and they copied that. And so this is not a wide open exercise
8 with respect to those two things.

9 And then more broadly, with respect to our copyright
10 allegations, they're copying Version 5.2.1 and 5.3 every time
11 they hold over on a breach. So, it's our code that is the
12 basis for the comparison, for example, of copyright
13 infringement there because they're continuing to use our code.
14 And I've identified several proprietary parts of it, but there
15 are others as well.

16 You know, and so I think that the complaint is well
17 pled; and I think that while they're painting this out to be
18 something much broader than it is, I think I've laid out three
19 or four things, user interface and these two other pieces of
20 code, and a radio. And this is not a wide-open thing. There
21 could be others, but I haven't laid out something that -- we
22 haven't laid out something that is this wide open thing.

23 And it's not just the user interface that infringes.
24 As we've said, it's holdover, you know, infringement by them
25 and, you know, contributory inducement. There's copying of

1 these parts that we identify, calibration and configuration
2 and so forth. And that's just the copyright piece of it.

3 So, anyway, I think that -- you know, that we've
4 provided more information here, and not less, and I just don't
5 see any benefit to -- you know, to having to make it more
6 specific. We're happy to do it if that's what your Honor
7 wants, but we think that it's all here.

8 THE COURT: All right. Okay. Well, thanks for your
9 briefs, and thanks for your arguments here this morning in
10 responding to my questions. I'm going to --

11 MR. GUY: Your Honor, there are other claims. I'm
12 not sure if you want us to address them, other than just the
13 copyright and the contract claim. I believe that the Illinois
14 count also fails, as well as Count 7, which is tortious
15 interference. We can -- on the other counts --

16 THE COURT: I was able to grasp those other counts.

17 MR. GUY: What was that?

18 THE COURT: I was able to understand --

19 MR. GUY: Thank you.

20 THE COURT: -- the parties' positions on those other
21 counts.

22 MR. GUY: I mean, we're here. We're happy to talk,
23 your Honor, if you have any questions; but we think those are
24 fairly clear.

25 THE COURT: Okay.

1 MR. BERTIN: And I think our brief is fairly clear on
2 the points we talked about, and those other points as well.

3 THE COURT: Yes.

4 MR. BERTIN: Thank you, your Honor.

5 THE COURT: Jackie, let's set this for the week of
6 January 21st.

7 THE CLERK: Sure. How about January 23rd, 9:15 a.m.

8 THE COURT: It's my hope to issue a ruling before
9 then. If I can't, then I'm just going to push back the status
10 hearing. And again, if anybody wants to come in on a motion
11 with respect to the MIDPs or discovery generally, you can do
12 so.

13 MR. BERTIN: What is the status, your Honor, of
14 the -- of discovery in the case? Should we --

15 THE COURT: Well, right now, we're under the MIDP,
16 and that's just how it goes. And then you do the MIDPs and
17 then go forward with discovery afterwards. So, unless it's
18 changed, that's what they're doing.

19 MR. GUY: I have a conflict on the 23rd. I could
20 do -- I'm not sure whether the 25th is open.

21 THE CLERK: How about the 24th?

22 MR. GUY: 24th, I have another hearing.

23 THE CLERK: 28th?

24 MR. GUY: One second. 28th? 28th is fine.

25 THE CLERK: January 28th?

1 MS. HERRINGTON: January 28th.

2 THE CLERK: 9:15 a.m.

3 MR. BERTIN: That works for me.

4 MS. HERRINGTON: That's a Monday, is that correct?

5 THE CLERK: Yes.

6 MS. HERRINGTON: Thank you.

7 MR. GUY: Thank you, your Honor.

8 MR. BERTIN: Thank you, your Honor.

9 MS. HERRINGTON: Thank you, your Honor.

10 THE COURT: Thanks.

11 (Which were all the proceedings heard.)

12 CERTIFICATE

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter.

15

16 */s/Charles R. Zandi*

December 12, 2018

17 Charles R. Zandi
18 Official Court Reporter

Date

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